FILED

00-858 NOV 27 2000

Record No. _____

In The Supreme Court of the United States

LYNDA G. BAREFOOT, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF W. RONALD BAREFOOT,

Petitioner,

v.

THERMO INDUSTRIES, INC. PROFIT SHARING PLAN AND TRUST BY ITS DULY APPOINTED TRUSTEES HAROLD G. HALL, TRACEY BAREFOOT, AND MICHELLE BAREFOOT BELLINGER,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

---

PETITION FOR A WRIT OF CERTIORARI

Trawick H. Stubbs, Jr.
Counsel of Record
STUBBS & PERDUE, P.A.
310 Craven Street
Post Office Box 1654
New Bern, NC 28563-1654
(252) 633-2700

Counsel for Petitioner

November 22, 2000

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

50pp

QUESTION PRESENTED

Whether the erroneous interpretation of the subject profit-sharing plan by the North Carolina Court of Appeals, which represents the first attempt by any court to interpret the language of a tax-qualified profit sharing plan amended subsequent to the enactment of the Retirement Equity Act, is contrary to the principles set forth by this Court in *Boggs v. Boggs* and subsequent decisions of this Court.

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceeding in the court below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 3

REASON FOR GRANTING THIS PETITION 7

THE ERRONEOUS INTERPRETATION OF THE THERMO PLAN BY THE NORTH CAROLINA COURT OF APPEALS, WHICH REPRESENTS THE FIRST ATTEMPT BY ANY COURT TO INTERPRET THE LANGUAGE OF A TAX-QUALIFIED PROFIT SHARING PLAN AMENDED SUBSEQUENT TO THE ENACTMENT OF REA, IS CONTRARY TO THE PRINCIPLES SET FORTH BY THIS COURT IN *BOGGS V. BOGGS*. 7

CONCLUSION 19

APPENDIX

TABLE OF AUTHORITIES

Page (s)

CASES

Art Builders Profit Sharing Plan v. Bosley, 649 F. Supp. 848 (D. Md. 1986) 18, 19

Binks Mfg. Co. v. Casaletto-Burns, 657 F. Supp. 668 (N.D. Ill. 1986) 8

Boggs v. Boggs, 520 U.S. 833 (1997) 1, 9, 14

Donohue v. Shell Provident Fund, 656 F. Supp. 905 (S.D. Tex.1987) 8

In re Wilson, 138 Misc. 2d 437, 524 N.Y.S.2d 1007 (1988) 8

Lucaskevge v. Mollenberg, 11 E.B.C.1355 (W.D.N.Y. 1989) 8

Moore v. Philip Morris Cos., Inc., 8 F.3d 335 (6th Cir. 1993) 8

Naddeo v. Officers & Employees Pension Plan, 637 F. Supp. 82, (E.D. Pa. 1986) 8, 18, 19

Stickney v. Muhlenberg College TIAA-CREF Retirement Plan, 896 F. Supp. 412 (E.D.Pa. 1995) 8

United Parcel Serv., Inc. v. Riley, 142 Misc. 2d 424, 538 N.Y.S. 2d 1022 (Sup. Ct. 1989) 8

TABLE OF AUTHORITIES - continued

STATUTES

U.S. CONST. art. VI, cl. 2 2

26 U.S.C. § 401, *et seq* 8

26 U.S.C. §417(a)(2)(A) 12

26 U.S.C. §417(c)(1) 12

26 U.S.C.§417(c)(2) 12, 13

29 U.S.C. § 1055 *et seq.* 8

29 U.S.C. §§1055(d) 14

29 U.S.C. §1055(a)(2) 16

29 U.S.C. §1055(e) 3, 14

N. C. GEN. STAT. § 7A-31 7

OTHER AUTHORITY

Retirement Equity Act ("REA"), PUB. L. NO. 98-397, 98 STAT. 1429 . . . . . 3, 8

PETITION FOR WRIT OF CERTIORARI

Lynda G. Barefoot, Petitioner, respectfully prays that the Supreme Court issue a writ of certiorari to review the Order of the North Carolina Supreme Court in this case denying Petitioner's Petition for Discretionary Review of an opinion of the North Carolina Court of Appeals. Petitioner respectfully asserts that review of this matter is appropriate because the decisions below are inconsistent with decisions of this Court, including *Boggs v. Boggs*, 520 U.S. 833 (1977). Because the decision below represents the first attempt by any court to interpret the provisions of a profit-sharing plan amended subsequent to the enactment of REA, the accuracy of the decision reached by the North Carolina Court of Appeals represents a matter of significant federal interest given ERISA's central goal of nationwide uniformity in the application of that Act's provisions. For these reasons, certiorari should be granted.

OPINIONS BELOW

The Order of the North Carolina Supreme Court in the matter of *Lynda G. Barefoot, Individually and as Administratrix of the Estate of W. Ronald Barefoot v. Thermo Industries, Inc. Profit Sharing Plan and Trust by its Duly-Appointed Trustees, Harold G. Hall, Tracey Barefoot and Michelle Barefoot Bellinger*, No. 211P00 (August 28, 2000), is on pages 1-2 of the Appendix. The opinion of the North Carolina Court of Appeals in this matter, No. COA99-249 (April 4, 2000), is on pages 3-13 of the Appendix. The Judgment of the Carteret County Superior Court, No. 97-CVS-

106 (September 2, 1998), from which Petitioner appealed, is on pages 14-23 of the Appendix.

JURISDICTION

The Order of the North Carolina Supreme Court was filed August 28, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The Supremacy Clause of the Constitution of the United States provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

Section 1055(e)(2) of the Act defines qualified pre-retirement survivor annuity as "an annuity for the life of the surviving spouse[,] the actuarial equivalent of which is not less

than 50 percent of the portion of the account balance of the participant (as of the date of death) to which the participant has a nonforfeitable right[.] 29 U.S.C. § 1055(e)(2).

STATEMENT OF THE CASE

Petitioner Lynda G. Barefoot ("Mrs. Barefoot" or "Petitioner") is the former spouse of W. Ronald Barefoot. Mr. Barefoot was employed by Thermo Industries, Inc. and was a participant in a certain profit-sharing and pension plan (hereafter, the "Thermo Plan"). In 1980, he signed two documents: a revocable trust (the "1980 Trust"), and a beneficiary designation form for the Thermo Plan. The beneficiary designation form named the trustee of the 1980 Trust (Respondent Hall) as the Thermo Plan beneficiary. The 1980 Trust identified Mr. Barefoot's former wife, Anita Barefoot Yeargin, as the beneficiary of his trust and his two daughters, Respondents Tracey Barefoot and Michelie Barefoot Bellinger, as the contingent beneficiaries.

Mr. Barefoot and his first wife divorced in 1981 and she remarried in 1985. In 1994, Mr. Barefoot married Lynda Barefoot. Mr. Barefoot never amended the beneficiary designation form for the Thermo Plan, although shortly before his death he requested the entire account balance from Respondent Thermo. His request was not acted upon prior to his death.

In 1984, Congress amended ERISA and the Internal

Revenue Code by passing the Retirement Equity Act ("REA"), PUB. L. NO. 98-397, 98 Stat. 1429, *codified at* 29 U.S.C. § 1055 *et seq.* and 26 U.S.C. § 401, *et seq.* (R p.36). The REA was intended to protect a surviving spouse's interest in the participant spouse's retirement plan. The sponsors of the Thermo Plan responded to REA by amending the plan in March 1986 to incorporate the requirements of the new law. The Thermo Plan was amended twice thereafter and was last restated in its entirety in 1992. The 1992 version of the Thermo Plan is the operative plan for this case.

Mr. Barefoot died in 1996. Shortly thereafter, The Petitioner applied for a distribution from the Thermo Plan as did Trustee Hall.

Mrs. Barefoot commenced this action on January 28, 1997 seeking a declaration of the parties' rights to the proceeds from the Thermo Plan (approximately $405,000.00). In her Complaint, Mrs. Barefoot asserted that she was the proper recipient of the entire account balance existing in Mr. Barefoot's pension account at the time of his death.

The Respondents answered and counter-claimed for a declaration that the plan provided a life annuity for Mrs. Barefoot funded with approximately 50% of the account proceeds and the remainder to be distributed to the 1980 Trust.

The Thermo Plan filed an answer supporting the Respondents' plan interpretation. Subsequently, the Thermo

Plan moved to amend its answer to reflect that it was not endorsing either party's interpretation of the Thermo Plan and it desired to remain neutral with respect to which interpretation was correct. This motion was granted.

Mrs. Barefoot and Respondents filed cross-motions for summary judgment based upon a joint stipulation of facts. The motions were heard by the Carteret County Superior Court, the Honorable James R. Vosburgh presiding, which denied the motions on the grounds that there were unresolved fact issues necessary for interpretation of the plan.

Thereafter, Mrs. Barefoot noticed the trial deposition of the Thermo Plan's administrator. Attorney David P. Nanney, Jr. appeared in response to the notice due to his familiarity with the Thermo Plan, and represented at his deposition that he was appearing in response to the notice of deposition of the plan administrator. Mr. Nanney testified that Mrs. Barefoot was entitled to have an annuity funded with 100% of the plan participant's account balance.

Mrs. Barefoot also took trial depositions of Attorney Larry Koch and Actuary James Van Iwaarden. Koch was qualified as an expert in drafting profit sharing plans, the law of ERISA and the tax code. Van Iwaarden was stipulated to be an expert on actuarial calculations.

Koch testified that the Thermo Plan unambiguously provided for funding a surviving spouse's annuity with 100%

of the deceased participant's account. Van Iwaarden testified that based upon actuarial calculations, in any case where the Thermo Plan participant was younger than the surviving spouse, the Respondents' interpretation of the Thermo Plan would result in the surviving spouse not receiving at least 50% of the account balance. To summarize Koch's testimony, Koch opined that the daughters' interpretation of the plan would result in the plan being tax disqualified because the plan could not guarantee that at least 50% of the account would be used to fund a surviving spouse's annuity in cases where the surviving spouse is older than the participant.

At trial, the Respondents' counsel objected to all of this expert testimony. As to Nanney's deposition and the exhibits attached to it, the daughters' counsel objected on two grounds: (1) that Nanney was not the plan administrator and could not testify in that capacity; and (2) that because the plan was unambiguous, extrinsic evidence of the drafter's intent was irrelevant.

The trial court excluded all of Nanney's deposition and most of the exhibits attached to it. The court determined that Nanney's testimony was irrelevant. The court also excluded the depositions of Van Iwaarden and Koch. In response, the Petitioner made an offer of proof that a plan must be able to apply to many different scenarios and that tax qualification would not depend on the circumstances of one case alone.

Following trial, the trial court issued its judgment. The

court concluded the plan provided for funding a survivor's annuity with "slightly more than" 50% of the decedent's account. This judgment was upheld by the Court of Appeals, which rejected each of the Petitioner's assignments of error, including the exclusion of the testimony of the Thermo Plan administrator and Petitioner's remaining experts.

On August 28, 2000, the North Carolina Supreme Court entered an Order denying Mrs. Barefoot's Petition for Discretionary Review under North Carolina General Statute § 7A-31.

REASON FOR GRANTING THIS PETITION

THE ERRONEOUS INTERPRETATION OF THE THERMO PLAN BY THE NORTH CAROLINA COURT OF APPEALS, WHICH REPRESENTS THE FIRST ATTEMPT BY ANY COURT TO INTERPRET THE LANGUAGE OF A TAX-QUALIFIED PROFIT SHARING PLAN AMENDED SUBSEQUENT TO THE ENACTMENT OF REA, IS CONTRARY TO THE PRINCIPLES SET FORTH BY THIS COURT IN *BOGGS V. BOGGS*.

Although Mrs. Barefoot is not formally identified as a beneficiary of the Thermo Plan, by virtue of Congress' 1984 amendment of the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code through the enactment of the Retirement Equity Act ("REA"), Congress

effectively mandated that Mrs. Barefoot be treated as a beneficiary. *See* PUB. L. NO. 93-397, 98 STAT. 1429, *codified at* 29 U.S.C. § 1055 *et seq.* and 26 U.S.C. § 401 *et seq.* In particular, REA required employers to amend their qualified plans to provide qualified pre-retirement survivor annuity ("QPSA") benefits to the surviving spouse of a vested participant who dies before the plan's annuity starting date. *Boggs v. Boggs*, 520 U.S. 833, 842 (1997); *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 340 (6th Cir. 1993); *Stickney v. Muhlenberg College TIAA-CREF Retirement Plan*, 896 F. Supp. 412, 419 (E.D.Pa. 1995); *Lucaskevge v. Mollenberg*, 11 E.B.C. 1355, 1358 (W.D.N.Y. 1989); *Donohue v. Shell Provident Fund*, 656 F. Supp. 905, 908 (S.D. Tex.1987); *Naddeo v. Officers & Employees Pension Plan*, 637 F. Supp. 82, 83 (E.D. Pa. 1986); *United Parcel Serv., Inc. v. Riley*, 142 Misc. 2d 424, 538 N.Y.S. 2d 1022 (Sup. Ct. 1989); *In re Wilson*, 138 Misc. 2d 437, 524 N.Y.S.2d 1007 (1988).

The adoption of REA effectively overrode contrary beneficiary designations in many instances. For example, in several cases where a surviving spouse's entitlement to QPSA benefits was challenged by designated beneficiaries (often children from a prior marriage), the surviving spouse's claim was upheld despite a contrary beneficiary designation on file with the plan. *Moore*, 8 F.3d at 340; *Lucaskevge*, 11 E.B.C. at 1359; *Donohue*, 656 F. Supp. at 908; *Binks Mfg. Co. v. Casaletto-Burns*, 657 F. Supp. 668, 671 (N.D. Ill. 1986); *Naddeo*, 637 F. Supp. at 84. This Court summarized the intent behind REA with the following: "[t]he statutory object of the

qualified joint and survivor annuity provisions, along with the rest of [REA], is to ensure a stream of income to surviving spouses." *Boggs*, 520 U.S. at 843.

There is no dispute that Mrs. Barefoot, as the spouse of Mr. Barefoot at the time of his death, is entitled to some distribution from Mr. Barefoot's account, even though she is not listed as a beneficiary, as a result of the language in the plan and the requirements for spousal benefits legislatively imposed by REA. Further, there is no dispute that the benefit to which Mrs. Barefoot is entitled is a QPSA. The dispute concerns the amount of the account which will be used to fund the QPSA.

To arrive at their separate interpretations, the parties adopted different road maps through the plan document. Mrs. Barefoot's road map depends on the unambiguous language contained in two paragraphs of the document: ¶8.03 and ¶8.09. The Respondents' interpretation, adopted by the trial court, relies on five paragraphs: ¶8.03, ¶3.29, ¶3.28, ¶8.02 and ¶16.04.

Mrs. Barefoot's analysis begins with ¶8.03 which is the section of the plan which gives a detailed description of the operation of QPSA benefits. The language provides:

> ¶8.03 Death Before Annuity Starting Date, Qualified Pre-Retirement Survivor Annuity. Unless an optional form of benefit has been selected within the election period pursuant to a qualified election, *if a participant dies before the annuity starting date then the participant's vested account balance shall be applied toward the purchase of an annuity for the life of the surviving spouse in the form of a Qualified Pre-Retirement Survivor Annuity* as herein defined. The surviving spouse may elect to have such annuity distributed within a reasonable period after the participant's death.

(Emphasis added). Mrs. Barefoot's interpretation then moves to ¶8.09 where the phrase "vested account balance" is defined as follows:

> ¶8.09 Vested Account Balance. For purposes of this Article the term "vested account balance" means the aggregate value of the participant's vested account balances derived from Employer and Employee contributions (including rollovers), whether vested before or upon death, including the proceeds of insurance contracts, if any, on the participant's life. The provisions of this Article shall apply to a participant who is vested in amounts attributable to Employer contributions, employee contributions (or both)

at the time of death or distribution.

The Respondents' plan interpretation begins with ¶8.03 as set forth above and then moves to ¶3.29. Paragraph 3.29 is a definitional section which is pulled from the language of the statute. Paragraph 3.29 defines a QPSA as: "a survivor annuity for the life of the surviving spouse if: (a) [t]he payments due the surviving spouse are not less than the amounts which would be payable as a survivor annuity under the qualified joint and survivor annuity provided for under the plan (or the actuarial equivalent thereof). . . "

The Respondents next refer to the language contained in ¶3.28 which is the generic definitional language concerning the qualified joint and survivor annuity ("QJSA") benefit. Paragraph 3.28 provides as follows:

> ¶3.28 "Qualified Joint and Survivor Annuity": An immediate annuity for the life of the participant with a survivor annuity for the life of the spouse which is the amount of the annuity which is payable during the joint lives of the participant and the spouse and which is the amount of benefit which can be purchased with the participant's vested account balance.

From ¶3.28 which defines a QJSA, the Respondents then move to ¶8.02 which outlines how a QJSA operates:

> ¶8.02 Mandatory Form of Benefit. Unless an optional form of benefit is selected pursuant to a qualified election within the ninety (90) day period ending on the annuity starting date, a married participant's vested account balance will be paid in the form of a qualified joint and survivor annuity and an unmarried participant's vested account balance will be paid in the form of a life annuity. The participant may elect as herein provided to have such annuity distributed upon attainment of the earliest retirement age under the Plan. The survivor annuity which shall be paid to the participant's spouse shall be 50% of the annuity which is payable during the joint lives of the participant and the spouse.

Finally, the Respondents' interpretation concludes by reference to ¶16.04 of the plan. Paragraph 16.04 outlines beneficiary designation procedures as follows:

> ¶16.04 Beneficiary Designation. Any participant may from time to time, designate in writing upon forms supplied by the Plan Administrator, any person or persons contingently or successively to whom the Trustee will pay his accrued benefits in the event of the participant's death and the participant may designate the form and method of payment. . .

> If the joint and survivor requirements of this Plan apply to the participant this section does not impose any special spousal consent requirements on the participant's beneficiary designation. However, in the absence of spousal consent as otherwise provided in this Plan to the beneficiary designation the designation will apply only to the portion of the death benefit, if any, which is not subject to joint and survivor requirements.

Mr. Nanney, on behalf of Respondent Thermo, testified concerning the history and background of the plan document. His testimony covered the 1986 amendments which brought the plan into compliance with REA, and addressed subsequent amendments and restatements necessitated by changes in the law. To facilitate the process of making with such changes, Mr. Nanney explained to the Thermo Plan that his firm would develop a prototype plan which would reduce the cost of going through the IRS approval process.

Paragraph 1.35 of Mr. Nanney's prototype plan, which is ¶3.29 of the plan being interpreted in the instant case, includes the definitional language contained in 26 U.S.C.§417(c)(1). This provision of the Internal Revenue Code defines a QPSA for a defined benefit style plan and establishes a mandatory minimum amount which a QPSA must provide to satisfy IRS tax qualification standards. A related provision, 26

U.S.C. §417(c)(2), specifies a modified rule in the case of defined contribution style plans, like the Thermo Plan, and Nanney's firm's prototype. This section of the Tax Code defines a QPSA as: "an annuity for the life of the surviving spouse the actuarial equivalent of which is not less than 50 percent of the portion of the account balance of the participant as of the date of death." 26 U.S.C. §417(c)(2).

Mrs. Barefoot asserts that ¶8.03, by its terms, applies to situations, like this, where the participant dies before the annuity starting date. Under these circumstances, ¶8.03 directs the plan administrator to apply the "vested account balance" "towards" the purchase of an annuity for the life of the surviving spouse in the form of a QPSA. Plan ¶8.09 then defines the phrase "vested account balance" as: "the aggregate value of the participant's vested account balances derived from employer and employee contributions (including rollovers) . . .". There is no dispute that Mr. Barefoot was fully vested. As such, the term "vested account balance" means the entire account.

In support of her position, Mrs. Barefoot submits that the definitional language of ¶3.29 of the Thermo Plan is not a mandate to fund a QPSA with **only** 50% of the account. Instead, ¶3.29 reflects the **minimum** QPSA benefit which must be paid to satisfy REA. *Boggs*, 520 U.S. at 834 (observing that REA sets the "minimum" survivor annuity at 50% of the annuity payable during the joint lives of the participant and spouse). 29 U.S.C. §1055(d) and 29 U.S.C. §1055(e)(defining

a QPSA as not less than the QJSA which, in turn, is defined as not less than 50% nor more than 100% of the amount of the annuity which is payable during the joint lives of the participant and spouse).

Critically, ¶3.29 uses the phrase "not less than" in describing the amount of the QPSA payment in relation to the QJSA payment. The plan specifies that the QPSA payments "due the surviving spouse are **not less than** the amounts which would be payable as a [QJSA]." (emphasis added). As such, ¶3.29 merely sets out the minimum benefit that a QPSA must guarantee to the surviving spouse. Thereafter, in ¶8.03 of the plan, the plan addresses specifically how a QPSA is to be structured, *i.e.* , a QPSA is to be funded by the entire account balance. This interpretation of the language gives meaning to the "not less than" language and fully integrates ¶3.29 with ¶8.03 because 100% is "not less than" 50%.

Conversely, the Respondents' interpretation, adopted by the trial court and North Carolina Court of Appeals, relies on five paragraphs of the Thermo Plan – 8.03, 3.29, 3.28, 8.02 and 16.04 – read in succession. The Respondents then direct the reader to plan ¶8.02, which provides for the funding of a QJSA as follows:

> Unless an optional form of benefit is selected . . . a married participant's vested account balance will be paid in the form of a [QJSA]. . . . The survivor annuity which shall

> be paid to the participant's spouse shall be 50% of the annuity which is payable during the joint lives of the participant and the spouse.

The Respondents rely upon the last clause of ¶8.02 which references the 50% figure to justify funding the Petitioner's QPSA with only 50% of the account. The Respondents did not address the tax-qualification problems raised by their interpretation of the Thermo Plan.

The Petitioner respectfully submits that the subject matter of this Petition has significant public interest in that it offers the first attempt by any court, whether federal or state, to interpret the language of a tax-qualified profit sharing plan amended subsequent to the enactment of REA. Generally, as recognized by the North Carolina Court of Appeals, REA was intended to provide an employee's surviving spouse an unconditional right to an annuity (the qualified pre-retirement survivor annuity, or QPSA) paid out of the proceeds of that employee's retirement account unless the spouse affirmatively waives – in writing – the right to receive the annuity. *See generally* 29 U.S.C. § 1055(a)(2).

Because it is not disputed that the Petitioner has not waived her right to the QPSA, here, at its core, the North Carolina Court of Appeals has affirmed a trial court ruling that (i) ascribes a different meaning to a profit-sharing plan than that intended by its drafter and plan administrator; and (ii) affirms an interpretation of a profit-sharing plan that

jeopardizes its previously tax-qualified status. This decision has significant consequences concerning the Petitioner (in addition to other similarly-situated beneficiaries under REA) because it jeopardizes receipt of plan funds despite the plan administrator's belief that the plan have a certain desired interpretation. The decision also has significant consequences for Respondent Thermo Industries, Inc. (as well as other similarly situated companies) whose profit-sharing plans can be subjected to interpretations different than those intended, and the risk that such interpretations could endanger the plans' tax-qualified status is of particular importance to employers. In sum, given the overwhelming prevalence of pension and profit-sharing plans offered by today's employers, this case is deserving of special consideration by this Court.

Additionally and perhaps most important, as of the time of trial and continuing through the date of this Petition, no federal or state court has addressed the precise factual situation presented by this case. That is, based upon the Petitioner's review of available precedent, no court has addressed the interpretation of a profit-sharing plan amended *after* the enactment of REA in which the surviving spouse has sought an annuity funded with 100% of a plan participant's account balance in the face of a competing beneficiary designation.

At trial and during the state-court appeal process, both parties relied on older opinions that offered only limited assistance in assessing the issues presented by this case, and the North Carolina Court of Appeals, following the lead of the trial

court, relied almost exclusively upon the single decision of *Art Builders Profit Sharing Plan v. Bosley*, 649 F. Supp. 848 (D. Md. 1986) for its decision. Both the trial court's and appellate court's reliance on *Art Builders* is misplaced. In that case, the plan participant, Mr. Bosely, died prior to the effective date for REA. *Art Builders*, 649 F. Supp. at 850. REA transitional rules applied to provide Mrs. Bosley with "an annuity for [her] life . . . [not less in value than] 50% of the account balance of the participant as of the date of death." *Id.* The *Art Builders* court applied the statutory minimum required by the transitional rules and funded Mrs. Bosley's QPSA with 50% of her late husband's plan account. *Id.* Nothing in the *Art Builders* opinion indicates whether the actual plan document called for more than 50% of the account balance to be used. One can safely assume, however, that the plan only called for the statutory minimum, otherwise, Mrs. Bosely would have certainly requested the larger percentage.

Hence, the *Art Builders* case is inapplicable because in this case the plan was amended after REA and the amended plan language expressly provides for funding with the "vested account balance" – not the 50% minimum required by the REA transitional rules.

The Petitioner respectfully submits that this case is more closely aligned with the decision in *Naddeo v. Officers and Employees Pension Plan*, 637 F. Supp. 82 (E.D.Pa. 1986), on which the Petitioner relied. In that case, the widow's claim would be decided under the REA transitional rules unless the

plan had been amended to provide more than the 50% minimum. Although the plan in *Naddeo* had been amended and would have provided for 100%, the amendment occurred after the participant's death and was not applicable. *Id.* at 85. In other words, but for the unfortunate timing of the participant's death, the widow in *Naddeo* would have received a life annuity funded with 100% of her late husband's account because the plan had been amended to provide for this outcome. The North Carolina courts erred in relying upon *Art Builders* and not on *Naddeo*.

CONCLUSION

For the foregoing reasons, Lynda G. Barefoot respectfully requests that the Court grant this petition for a writ of certiorari.

Respectfully submitted,

Trawick H. Stubbs, Jr.
Counsel for Petitioner
STUBBS & PERDUE, P.A.
310 Craven Street
P.O. Box 1654
New Bern, NC 28563-1654
(252) 633-2700 phone
(252) 633-9600 facsimile

APPENDIX

APPENDIX

Order of the North Carolina Supreme Court,
No. 211P00 (August 28, 2000) 1

Opinion of the North Carolina Court of Appeals,
No. COA99-249 (April 4, 2000) 3

Judgment of the Carteret County Superior Court,
No. 97-CVS-106 (September 2, 1998) 14

No. 211P00 THREE-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

(Barefoot v. Thermo Industries et al)

LYNDA G. BAREFOOT, INDIVIDUALLY AND AS ADMINISTRATIX OF THE ESTATE OF W. RONALD BAREFOOT

v.

THERMO INDUSTRIES, INC. PROFIT SHARING PLAN AND TRUST BY ITS DULY APPOINTED TRUSTEES, HAROLD G. HALL, TRACEY BAREFOOT AND MICHELLE BAREFOOT BELLINGER

From NC Court of Appeals
(COA99-249)
From Carteret
(97CVS106)

****

ORDER

Upon consideration of the petition field by Plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 24th day of August 2000.

s/Freeman, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of August 2000.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

/s/
Carol B. Templeton
Assistant Clerk

Copy to:
North Carolina Court of Appeals
Mr. Trawick H. Stubbs, Jr. Attorney at Law, For Barefoot
Mr. Michael Lincoln, Attorney at Law, For Hall, T. Barefoot, Bellinger
Mr. R. Gene Edmundson, Attorney at Law, for Hall, T. Barefoot, and Bellinger
Mr. Ralph A. White, Appellate Court Reporter
West Publishing Compnay
Lexis-Nexis

NO: COA99-249

NORTH CAROLINA COURT OF APPEALS

Filed:4 April 2000

LYNDA G. BAREFOOT,
INDIVIDUALLY AND AS
ADMINISTRATRIX OF THE ESTATE
OF W. RONALD BAREFOOT,
Plaintiff-Appellant,

v.

Carteret County
No. 97 CVS 106

THERMO INDUSTRIES, INC.
PROFIT SHARING PLAN AND TRUST
BY ITS DULY APPOINTED TRUSTEES,
HAROLD G. HALL, TRACEY BAREFOOT,
AND MICHELLE BAREFOOT BELLINGER,
Defendant-Appellees.

Appeal by plaintiff from a judgment entered 2 September 1998 by Judge James R. Vosburgh in Carteret County Superior Court. Heard in the Court of Appeals 28 October 1999.

Stubbs and Perdue, P.A., by Trawick H. Stubbs, Jr. and David J. Haidt; Matthew B. Newman, P.A., by Matthew B. Newman; and Katherine L. MacKinnon, for plaintiff-appellant.

Edmundson and Lincoln, by Michael Lincoln and R. Gene Edmundson, for defendant-appellees Harold G. Hall, Tracey Barefoot, and Michelle Bellinger.

McGEE, Judge.

W. Ronald Barefoot (Mr. Barefoot) was an employee of Thermo Industries (Thermo) from June 1973 until February 1986. During Mr. Barefoot's employment with Thermo, he enrolled in the company's profit sharing plan (the plan). On 3 June 1980, Mr. Barefoot signed both a revocable trust agreement (the 1980 Trust Agreement) and a beneficiary designation form for the plan. The beneficiary designation form provided that the plan trustee was to pay "insurance proceeds and other death benefits payable under said plan" to the "Trustee, or its legal successor in trust, under trust agreement between Willie Ronald Barefoot and Harold G. Hall, Trustee, dated June 3, 1980."

The 1980 Trust Agreement named Harold G. Hall (Hall) as trustee. Hall was to use the assets of the trust to provide for Anita Baggett Jackson Barefoot, Mr. Barefoot's first wife. Mr. Barefoot's two daughters, Tracey Barefoot and Michelle Barefoot Bellinger, were contingent beneficiaries, entitled to Trust assets subject to the following provision of the Trust:

> Upon the death of my wife [Anita] or her remarriage, whichever shall first occur, the principal and accumulated income then constituting my trust estate shall be apportioned in equal shares to such of my children as shall then be living.

Mr. Barefoot and Anita Barefoot were divorced on 4 November 1981, and Anita Barefoot remarried in May 1985. Mr. Barefoot left his employment with Thermo, moved to Morehead City, and started his own business. On 17 September

1994,. Mr. Barefoot married Lynda G. Barefoot (plaintiff).

Congress amended the Employee Retirement Income Security Act of 1974 (ERISA) statute and the Internal Revenue Code by passing the Retirement Equity Act (REA) in 1984. The purpose of REA was to broaden protection of surviving spouses' interests in plan participants' retirement plans. REA provides a surviving spouse an unconditional right to an annuity paid out of the funds of a participant's retirement account unless the spouse waives the right in writing. In order to accommodate these changes and thus retain the desired tax status, Thermo amended its plan in 1986 and again in 1992.

Mr. Barefoot was not entitled under the plan to a distribution from his account until the close of the plan year in which he reached age fifty-five, the earliest retirement age. Thermo's plan year ended September 30 of each year. Mr. Barefoot became fifty-five years old on 25 March 1996 and was entitled to a distribution, upon request, on 30 September 1996. He sent a letter to the plan's administrative committee in January 1996 requesting distribution of his account funds as soon as possible after 30 September 1996. On 31 October 1996, Mr. Barefoot died without having received any distribution from his plan account.

Plaintiff qualified as administratrix of Mr. Barefoot's estate and applied to the plan for a distribution of Ronald Barefoot's account proceeds in November 1996. Likewise, Hall applied to the plan for a distribution of the same account proceeds in his capacity as trustee under the 1980 Trust Agreement. Plaintiff filed suit in both her individual and representative capacities against Thermo, Hall and the Barefoot daughters, seeking an order requiring Thermo to pay Mr. Barefoot's entire account balance to her, individually, or to the estate of Mr. Barefoot. Defendants answered and

counterclaimed for a judgment declaring the rights, obligations, and duties of the parties. Each party moved for summary judgment, but their motions were denied by the trial court. After a full hearing on the merits, the trial court made findings of fact and conclusions of law, and entered the following judgment:

> Upon the foregoing, it is now, therefore, ORDERED, ADJUDGED and DECREED that the plaintiff, Lynda Barefoot, be and she is hereby granted a surviving spouse annuity equal to fifty percent (50%) of the Ronald Barefoot vested account balance. Actually speaking, it would be slightly more than fifty percent (50%) with the remaining balance to be distributed to the defendant, Harold G. Hall as Trustee for the defendants, Tracey Elizabeth Barefoot and Alicia Michelle Barefoot Bellinger.

Plaintiff appeals from this judgment.

We first note that defendants' brief is in violation of the page limitation mandated by N.C.R. App. P. 28(j) and the requirement of at least 11 point type containing no more than 65 characters per line as required by N.C.R. App. P. 26(g), and as Interpreted by *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 147, 468 S.E.2d 269, 273 (1996). See *Atlantic Veneer Corporation v. Robbins*, _____ *N.C. App.* _____ 516 S.E.2d 169, 172 (1999). Defendants used a font that produces up to 70 characters per line and did not "leav[e] a margin of approximately one inch on each side [of the page]." N. C. R. App. P. 26(g). Nevertheless, we will consider the arguments in defendants, brief pursuant to N.C.R. App. P. 2.

All parties agree that plaintiff is entitled to an annuity. The issue considered by the trial court was whether the annuity

was to be funded by using the entire balance of Mr. Barefoot's pension account or by using only. one-half of that amount. The trial court concluded that about one-half of the pension account balance was to be used to fund a pre-retirement survivor annuity for plaintiff, and the balance was to be paid to Hall as trustee under the 1980 Trust Agreement. We agree.

Plaintiff argues the trial court erred in: (1) denying her motion for summary judgment where the profit sharing plan unambiguously provided that a deceased participant's surviving spouse would receive an annuity funded with the entire balance from the decedent's account; and (2) excluding plaintiff's evidence explaining the meaning and intent of the plan language while admitting defendant's expert evidence on the meaning of the plan language.

The parties agreed below that the language embodied by the plan was unambiguous, and the trial court agreed. Whether an ambiguity exists is a question of law and is determined by the trial court. *Bicket v. McLean Securities,* Inc., 124 N.C. App. 5481 553, 478 S.E.2d 518, 521 (1996), *disc. review denied,* 346 N.C. 275, 487 S.E.2d 538 (1997) . Appellate review of the trial court's decision relating to ambiguity is *de novo. Id.* Our decisions provide that "'[i]f the plain language of a contract is clear, the [original] intention of the parties is inferred from the words of the contract. Id. at 552, 478 S.E.2d at 521 (quoting *Walton v. City of Raleigh,* 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996)). We find no ambiguity in the plan. Rather, both plantiff and trust beneficiaries disagree as to how the law applies to the plan, and they attempted to introduce expert testimony by lawyers who offered their opinions of the plan.

"[E]xpert testimony is properly admissible when [it] can assist the jury [in] drawing certain inferences from facts [and] the expert is better qualified [than the jury to draw such

inferences] *State v. Bullard*, 312 N.C. 129, 139, 322 S.E.2d 370, 376 (1984) *see also* N.C. Gen. Stat. § 8C-1, Rule 702 (1992). Pursuant to N.C.R. Evid. 704, expert opinion testimony may even embrace an ultimate issue to be decided by the trier of fact. *HAJMM Co. v. House "of Raeford Farms*, 328 N.C. 578, 585, 403 S.E.2d 483, 488 (1991); N.C. Gen. Stat. § 8C-1, Rule 704 (1992). In determining whether expert testimony should be admitted, "the inquiry should be not whether it invades the province of the jury, but whether . . . the witness because of his expertise is in a better position to have an opinion on the subject than is S.E.2d 905, 911 (1978); Rule 704 official commentary. However,the trier of fact." *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E.2d 905,911 (1978); Rule 704 official commentary. However, while an expert may testify to the existence of the factual components, the expert may not testify as to the legal conclusions; such testimony invades the court's province to determine the applicable law and to instruct the jury on that law. *HAJMM*, 328 N.C. at 586-87, 403 S.E.2d at 488-89; *see also* official commentary to N.C.R. Evid. 704.

"When the expert witness is *an expert legal witness*, the avoidance of testimony regarding legal conclusions can be problematical since attorneys deal with legal terms of art on a daily basis." *Smith v. Childs*, 112 N.C. App. 672, 680, 437 S.E.2d 500, 506 (1993) (attorney may not testify to legal effect of a document). "Unlike most other experts, the legal expert is well versed in the law and has knowledge of the *legal issues* facing the court." *Id.* However, the legal expert is not allowed to either interpret the law or to testify as to the legal effect of particular facts. Cf. *Wise v. Wise*, 42 N.C. App. 5, 7, 255 S.E.2d 570, 572, *disc. review denied*, 298 N.C. 305, 259 S.E.2d 300 (1979). Allowing expert testimony on these matters would amount to a jury instruction on the applicable law, thereby improperly invading the province of the court. *Williams v. Sapp*, 83 N.C. App. 116, 119-120, 349 S.E.2d 304,306 (1986);*see*

also Board of Transportation v. Bryant, 59 N.C. App. 256, 260-61, 296 S.E.2d 814, 817 (1982) (testimony improperly offered to determine the legal outcome of the case). In other words, the presentation of a legal position is not "relevant evidence." *See, e.g., Raintree Homeowners Assn. v. Bleimann*, 116 N.C. App. 561, 569, 449 S.E.2d 13, 18 (1994), *rev'd on other grounds*, 342 N.C. 159, 463 S.E.2d 72 (1995) ("Exhibits 8, 13, and 18 merely indicate plaintiff's legal position towards defendants and thus do not have a tendency to prove a fact at issue in the case."). And more specifically, "the opinion of an attorney as to the legal effect of a document is generally not admissible. *Childs*, 112 N.C. App. at 681, 437 S.E.2d at 506-07. Thus, the trial court properly excluded the testimony of attorney David P. Nanney, who was experienced with ERISA and drafted the plan; attorney Larry Kock, an expert in drafting profit sharing plans; and actuary James Van Iwaarden, who was stipulated to be an expert on actuarial calculations.

The trial court did allow the testimony of attorney Lois Colbert, an expert witness for the trust beneficiaries, who presented her legal analysis. However, this was a bench trial and the trial judge actually reviewed the three depositions of Nanney, Koch and Van Iwaarden submitted by plaintiff in determining their admissibility. Thus we find no prejudice to plaintiff in the trial court's permitting Colbert to testify. "No error in . . . the . . . exclusion of evidence . . . is ground for granting a new trial or for setting aside a verdict . . . unless refusal to take such action amounts to the denial of a substantial right." N.C. Gen. Stat. § 1A-1, Rule 61 (1990). "The burden is on the appellant not only to show error but also to enable the court to see that he was prejudiced and that a different result would likely have ensued had the error not occurred." *Raintree Homeowners*, 116 N.C. App. at 570, 449 S.E.2d at 19. Plaintiff has not shown that she was prejudiced by Colbert's testimony and that had Colbert's testimony been excluded, a different

result would likely have ensued. *See* id.

The question of who prevails under the plan in this case is dependent upon statutory analysis and application of contract law. A basic tenet of statutory construction is that courts must consider a statute in its entirety. *See Polaroid Corp. v.* Offerian,349 N.C. 290, 297, 507 S.R.2d 284, 290 (1998),*cert.* denied, _____ U.S. _____, 143 L. Ed. 2d 671 (1991) ("[T]he Court will evaluate the statute as a whole and will not construe an individual section in a manner that renders another provision of the same statute meaningless."). Similarly, when possible, statutes dealing with the same area of law should be read together so as to give effect to both. "It is well established that when there are two acts of the legislature applicable to the same subject, their provisions are to be reconciled if this can be done by f air and reasonable intendment, but to the extent that they are necessarily repugnant, the one last enacted shall prevail." *Nytco Leasing v. Southeastern Motels,* 40 N.C. App. 120, 125-26, 252 S.E.2d 826, 830 (1979). Finally," "[a] contract must be construed as a whole, considering each clause with reference to all other provisions and giving effect to each whenever possible by any reasonable construction." *McDonald v. Medford,* 111 N.C. App. 643, 647, 433 S.E.2d 231, 234 (1993).

The pension plan in this case is based upon REA, which requires that in the event a vested participant in a pension benefit Plan..dies before the annuity starting date and has a surviving spouse, the plan must provide a qualified pre-retirement survivor annuity (QPSA) to the surviving spouse. *See* 29 U.S.C. § 1055(a)(2). In a plan such as Mr. Barefoot's (a defined contribution plan), a QPSA is statutorily defined as an annuity for the life of the surviving spouse[,] the actuarial equivalent of which is not less than 50 percent of the portion of the account balance of the participant (as of the date of death) to which the participant had a nonforfeitable right[.] Id. at §

1055(e)(2). The parties stipulated that not less than 50% of the decedent[']s account must be used to fund this preretirement survivor annuity. Plans may provide that if less than 100% of the decedent[']s account is so used, that the remainder of that account shall be distributed to the designated beneficiary.

The plan itself may fix the amount due a surviving spouse between fifty percent and one hundred percent, but this plan did not do so. Rather, Mr. Barefoot signed the 1980 Trust Agreement and beneficiary designation that named other beneficiaries to receive "insurance proceeds and other death benefits payable under said plan." Thus, the remainder of the benefits exceeding the statutory minimum of fifty percent pass through the trust account. *See Michael J.* Canan, *Qualified Retirement Plans § 7.16[Fl (2000)* ("Apparently the other half can pass to other designated beneficiaries in any form without the spouse's consent.").

Another rule of statutory interpretation adopted by North Carolina courts is that specific language controls general language. *See Jones v. Shoji*, 336 N.C. 581, 583-84, 444 S.E.2d 203, 204 (1994). Section 8.03 of the plan is a rule of general applicability, which states "if a participant dies before the annuity starting date then the participant's vested account balance shall be applied toward the purchase of an annuity for the life of the surviving spouse in the form of a Qualified Pre-Retirement Survivor Annuity as herein defined." "Vested account balance" is defined by the plan as "the aggregate value of the participant's vested account balances. . . whether vested befoe or upon death[.]" Mr. Barefoot's entire account balance was vested at the time of his death.

In the plan that general rule is accompanied by pertinent specific rules, such as section 3.29, which defines QPSA as a survivor annuity, and section 8.02, which states: "The survivor

annuity which shall be paid to the participant's spouse shall be 50% of the annuity which is payable during the joint lives of the participant and the spouse." Moreover, legislative intent supports our inclusive statutory construction. "There is no indication in the language of the [REA] or in its legislative history to demonstrate that Congress intended the absence of spousal consent to render ineffective the designation of beneficiaries other than spouses, particularly designations which were made prior to the adoption of the [REA]." *Art Builders Profit Sharing Plan v. Bosely,* 649 F. Supp. 848, 851 (D. Md. 1986) (citing S. Rep. No. 575, 98th Cong. 2d Sess. 12 (Aug. 6, 1984)).

In *Art Builders,* an employee enrolled in a profit sharing, plan, that was subject to ERISA, and, which designated his children as beneficiaries. He had remarried approximately six months earlier, and REA became effective just before he died. The court held that upon the employee's death, his wife was entitled to not less than fifty percent of the account balance, and his children were entitled to the remainder. Under ERISA, "[t]he fundamental concept of the Plan is that a participant's beneficiaries are to be paid benefits based upon contributions made to the Plan by or on behalf of the participant." *Art Builders, 649 F. Supp. At 852.* Likewise in this case, Mr. Barefoot's trust, which was the named beneficiary of his plan, is entitled to the remainder of his account proceeds after plaintiff receives one-half. See *also Profit Sharing Plan v. Mbank Dallas, N.A.*, 683 F. Supp. 592, 595 (N.D. Tex. 1988) (the designation of a beneficiary in an ERISA plan is effective to the extent that QPSA benefits are not first paid to the surviving spouse).

Plaintiff argues Art *Builders* can be distinguished from this case by "safely assum[ing] . . . that the plan only called for the statutory minimum" in that case, whereas the plan in this

case "expressly provides for funding with the vested account balance[.],, We reject that distinction as it speculates upon *Art Builders* and merely repeats a fact that fits into our Court's analysis above. Plaintiff believes this case is "more closely aligned" with *Naddeo v. Officers and Employees Pension Plan, 637 F. Supp.* 82 (E.D. Pa. 1986), in which an employee's plan was unsuccessfully amended after his death to fund his widow's annuity with one hundred percent of his account. As the amendment to the plan was untimely, the widow received the statutory minimum of fifty percent instead. *Naddeo* supports the beneficiaries, position rather than plaintiff's.

Keeping these principles in mind and construing the plan language as a whole, the trial court properly determined that plaintiff was entitled to a surviving spouse QPSA actuarially equivalent to at least fifty percent of the participant's account balance in which the participant had a nonforfeitable right on the date of death.

Affirmed.
Judges HORTON and EDMUNDS concur.
Report per Rule 30(e).

NORTH CAROLINA | FILE # 97 CVS 106

CARTERET COUNTY | FILM #_____

LYNDA G. BAREFOOT, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF W. RONALD BAREFOOT,

PLAINTIFF

IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION

VS

JUDGMENT

THERMO INDUSTRIES, INC. PROFIT SHARING PLAN AND TRUST BY ITS DULY APPOINTED TRUSTEES, HAROLD G. HALL, TRACEY BAREFOOT, AND MICHELLE BAREFOOT BELLINGER

This cause coming on to be heard and being heard before the undersigned Judge presiding over the August 24, 1998 Special Civil Session of the Carteret County Superior Court, and it appearing to the Court as follows:

This is an action to determine the respective rights of the widow of W. Ronald Barefoot and his two daughters, Tracey Barefoot and Michelle Barefoot Bellinger, and Harold G. Hall, Trustee of the Trust established by W. Ronald Barefoot under the Thermo Industries, Inc. Profit Sharing Plan and Trust. The action was brought by the widow who was a second subsequent spouse. Mr. Barefoot's first marriage ended

in divorce. There were no children born to Mr. Barefoot's marriage to the plaintiff, Lynda G. Barefoot. The Plan administrator for Thermo Industries, Inc. has filed pleadings which take opposing views as to the entitlements under the Plan. After denying cross-motions for summary judgment, a non-jury bench trial was held. Based upon the evidence presented by plaintiff and defendant and the arguments of counsel, the court makes the following findings of fact.

1. The issue of fact for the Court is "Who is entitled to the proceeds of one account of the defendant, Thermo Industries, Inc. - Restated and Amended Profit Sharing Plan and Trust, which is a "Defined Contribution Plan" within the meaning of the Internal Revenue Code of 1986 as amended?

2. The specific account of the Plan at issue is that maintained for the use and benefit of the late W. Ronald Barefoot, a/k/a Willie Ronald Barefoot. (Hereinafter referred to as Ronald Barefoot)

3. The Plan is intended to meet, and has been amended to meet, the requirements of IRC 401 (a).

4. Jurisdiction is vested in this Court by virtue of 29 USCS 1132 (e) (1).

5. Ronald Barefoot was employed by Thermo Industries, Inc. as a seller of air conditioning equipment from June 18, 1973 until February 28, 1986.

6. Ronald Barefoot had at least one hour of service to Thermo Industries, Inc. on or after August 23, 1984.

7. Thermo Industries adopted the "Plan", which is Plaintiff's Exhibit #13, effective September 30, 1964. The Plan has been amended from time to time as required by the Internal Revenue Code to keep it in compliance with changes and

amendments to the law.

8. Ronald Barefoot, in due course by virtue of his employment, became a participant in the Plan.

9. On June 3, 1980, Ronald Barefoot signed a document entitled APPLICATION AND BENEFICIARY DESIGNATION FOR PROFIT SHARING PLAN FOR THERMO INDUSTRIES, INC. (hereinafter referred to as "Beneficiary Designation Form") A copy of the Beneficiary Designation Form has been introduced in evidence by the defendants, Defendants's Exhibit A.

10. The "Beneficiary Designation Form" provides in part as follows: "The Trustee (of the Plan) is hereby instructed to pay such benefits to the following named person, persons, or organizations: NAME: Trustee or its legal successor in trust, under agreement between Willie Ronald Barefoot and Harold G. Hall, Trustee, dated June 3, 1980." No other person, persons or entity was listed on the "Beneficiary Designation Form".

11. On June 3, 1980 Ronald Barefoot also signed a document entitled: TRUST AGREEMENT. Said agreement identifies Ronald Barefoot as the grantor and the defendant, Harold G. Hall, as the Trustee. Said agreement provides in part as follows:

> "That the grantor (Ronald Barefoot) has this day delivered to the Trustee (Harold G. Hall) the property described in Schedule A (which specifically identified the Plan) attached hereto and the Trustee agrees to hold, administer and distribute all of the aforesaid assets in accordance with the terms and

provisions hereinafter set out.

The Trust Agreement provided that following Ronald Barefoot's death, the Trustee was to disburse the income and principal from the trust as follows: "Upon the death of my wife or her remarriage, whichever shall first occur, the principal and accumulated income then constituting my trust estate shall be apportioned in equal shares to such of my children as shall then be living."

12. When Ronald Barefoot executed the Trust Agreement and the "Beneficiary Designation Form", he was married to Anita Baggett Jackson Barefoot.

13. Ronald Barefoot's marriage to Anita Baggett Jackson Barefoot produced two daughters, to wit, Tracey Elizabeth Barefoot (Tracey Barefoot), 4/21/678, and Alicia Michelle Barefoot Bellinger (Michelle Barefoot), 8/21/71.

14. Ronald Barefoot and Anita Baggett Jackson Barefoot were divorced on November 4, 1981.

15. The Retirement Equity Act (REA), Publ. No. 98-397, 98 Stat. 1429; 29 USCS 1005 and 26 USCS 401, was passed in 1984 by Congress, amending the ERISA Statute and the Internal Revenue Code.

16. Anita Baggett Jackson Barefoot (Ronald Barefoot's first wife) married Billy Yeargin in May of 1985.

17. In 1986 Ronald Barefoot started his own business in Morehead City, Carteret County, known as Dowty Air Conditioning, Inc.

18. The Thermo Industries Plan was properly and timely amended to comply with REA in March of 1986. The Plan was restated in its entirety on June 24, 1992 with an effective date

of October 1, 1989 for reasons not related to this court action. The 1992 Plan continues to incorporate the REA spousal benefit rules. The Plan was also amended on August 23, 1994 and October 1, 1996 for reasons not related to this action and the Plan is a part of this record as an exhibit for plaintiff and defendants as Plaintiffs Exhibit # 13 and is the operative Plan document at issue and controlling in this case.

19, On June 24, 1992 the Plan administrators or trustees provided Ronald Barefoot with an updated Summary Plan Description (SPD).

20. On September 17, 1994 Ronald Barefoot married Lynda Barefoot. No modification was made to the Plan.

21. Ronald Barefoot was not entitled to a distribution from his account in the Plan until the close of the Plan year in which he, Barefoot, became 55 years of age. Barefoot attained 55 years of age on March 25, 1996. The end of the Plan year in 1996 was September 30.

22. On January 5, 1996 Ronald Barefoot requested, by letter, the release of the account funds as soon as possible after September 30, 1996, which was the first date upon which he was entitled to distribution from his account.

23. Ronald Barefoot died intestate on October 31, 1996. Lynda Barefoot, plaintiff, was appointed Administratrix on November 19, 1996. Letters of Administration were issued by the Clerk of the Superior Court of Carteret County.

24. The Beneficiary Designation Form executed June 3, 1980 was never changed or amended.

25. Lynda Barefoot never signed anything conforming to 29 USCS 1005 (c)(2)(A) or 26 USCS 417 (a)(2)(A) waiving her rights to any of the proceeds of Ronald Barefoot's account

proceeds, nor did she consent to the designation of Ronald Barefoot's children, any Trustee, or any person or entity as beneficiaries of the Ronald Barefoot account proceeds.

26. Lynda Barefoot is entitled to some distribution from Ronald Barefoot's account by the terms of the Plan itself even though she is not designated as a beneficiary on the Designated Beneficiary Form.

27. In November of 1996 Lynda Barefoot, plaintiff, as surviving spouse, applied to the Plan for the distribution of the Ronald Barefoot account proceeds.

28. Harold G. Hall, as Trustee under the trust of June 3, 1980, applied to the Plan for a distribution of the proceeds of the Ronald Barefoot account for the use and benefit of the defendants, Tracey Barefoot and Michelle Barefoot Bellinger.

29. Plaintiff contends that the Plan entitles her to have the Ronald Barefoot entire vested account balance applied toward the purchase of a Qualified Pre-Retirement Survivor Annuity for the term of her life.

30. Harold G. Hall, as Trustee of the trust of June 3, 1980, Tracey Barefoot and Michelle Barefoot Bellinger contend that the Plan calls for fifty percent (50%) of the vested account balance to be applied towards the purchase of a Qualified Pre-Retirement Survivor Annuity for the life of the plaintiff, Lynda Barefoot, with the remainder to be distributed to them pursuant to the 1980 Beneficiary Designation Form and the June 3, 1980 Trust Agreement.

31. The value of the vested account balance of Ronald Barefoot as of the last valuation date of September, 1998 was approximately Four Hundred Five Thousand Dollars ($405,000.00).

32. Because of the dispute regarding distribution of the vested account balance, Trustees of the Plan have distributed to the plaintiff the sum of One Hundred Sixty-Two Thousand Dollars ($162,000.00), which represents that portion of the Plan funds which are not in dispute.

33. Plaintiff and defendants acknowledge there is an additional amount not in dispute to be distributed to the plaintiff, which she will receive regardless of the outcome of this legal action.

34. The parties stipulate the language in the following sections of the Plan are relevant to the questions to be determined by the Court: Sections 3.07, 16.04, 3.21, 12.03, 13.01, 3.29, 8.03, 8.09, 3.28, 16.18.

Based upon the foregoing findings of fact, the two questions presented for the Court's determination are as follows:

1. Is Mrs. Barefoot, to the exclusion of the children, entitled to received 100% of Mr. Barefoot's vested account balance? ANSWER: No

2. Is Mrs. Barefoot, alternatively, entitled to receive a qualified pre-retirement annuity? ANSWER: Yes

The Court is persuaded to this result for the following reasons:

1. The Plan is not ambiguous.

2. The case of ART BUILDERS PROFIT SHARING PLAN, ET AL VS. ARTHUR BOSLEY, ET AL, 649 F. Supp. 848, D Maryland, June 6, 1986, while not on all fours with the present case gives assistance to the conclusions reached.

3. On June 3, 1986 Ronald Barefoot designated the Trust as beneficiary. Upon the death of his wife or her

remarriage, whichever shall first occur, the principal cash accumulated income then constituting his trust estate shall be apportioned in equal shares to such of my children as shall then be living.

4. Ronald Barefoot divorced Anita Baggett Jackson Barefoot on November 4, 1981.

5. Anita Baggett Jackson Barefoot remarried in May of 1985.

6. Ronald Barefoot married the plaintiff, Lynda Barefoot, on September 17, 1994.

7. Ronald Barefoot never changed his Beneficiary Designation.

8. The Plan was amended repeatedly to make it comply with changes in the relevant law governing such plans.

9. The Plan provided for a minimum annuity of fifty percent (50%).

10. Ronald Barefoot is presumed to have known of the terms and provisions of the Plan by making a request on January 5, 1996 for the release of the account funds as soon as possible after the end of the Plan year on September 30, 1996.

11. The fifty percent annuity is automatic under the terms of the Plan unless Ronald Barefoot elected to waive pre-retirement survivor annuity coverage and his spouse consented in writing to the election.

12. Ronald Barefoot never made such an election and the plaintiff, Lynda Barefoot, never signed such a consent.

13. Plaintiff, Lynda Barefoot, first argues that Ronald Barefoot's designation of the trust or his children as beneficiaries in 1990 was nullified by the enactment of the Retirement Equity Act because that Act requires the consent of

the participant's spouse in order for a designation of any beneficiary other than the spouse to be effective. This argument is without merit. Nothing in the Act requires spousal consent to the designation of a beneficiary. All the Act provides is that unless the spouse files written consent not to take the pre-retirement survivor annuity, such an annuity shall be paid. There is no indication in the language of the Act or in its legislative history to demonstrate that Congress intended the absence of espousal. consent to render ineffective the designation of beneficiaries other than spouses, particularly designations which were made prior to the adoption of the Act. ART BUILDERS PROFIT SHARING PLAN, ET AL, Supra.

14. Just as the expert witness Colbert testified, you start with Section 8.03 of the Plan, then move to Section 3.29. From there you proceed to Section 3.28. That Section leads to Section 8.02 and then to Section 16.04.

15. These sections must be read in "*para materia*". None can be isolated and strictly construed without considering its relationship to the others.

Upon the foregoing, it is now, therefore, ORDERED, ADJUDGED and DECREED that the plaintiff, Lynda Barefoot, be and she is hereby granted a surviving spouse annuity equal to fifty percent (50%) of the Ronald Barefoot vested account balance. Actually speaking, it would be slightly more than fifty percent (50%) with the remaining balance to be distributed to the defendant, Harold G. Hall, Trustee for the defendants, Tracey Elizabeth Barefoot and Alicia Michelle Barefoot Bellinger.

This _____ day of August 1998.

/s/

JAMES R. VOSBURGH,
JUDGE PRESIDING